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REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

Minimum humanitarian standards

Report of the Secretary-General prepared pursuant to Commission resolution 1995/29

Addendum

The present document contains a summary of comments submitted by the Governments of Belarus, Jordan, Kuwait and Poland, as well as by the Office of the United Nations High Commissioner for Refugees and by the following non-governmental organizations: International Commission of Jurists and Inter-Parliamentary Union.

GE.96-11224 (E)

Belarus

[Original: Russian]
[16 February 1996]

The legislation in force in the Republic of Belarus, as also the obligations assumed by the Republic under international agreements to which it is a party, meet practically in full the requirements of the Declaration submitted. The following more detailed points may be noted.

The prescriptions of article 1 of the Declaration correspond to the provisions of articles 23 and 63 of the Constitution of the Republic of Belarus.

The prescriptions of article 2 of the Declaration correspond to the provision of article 22 of the Constitution of the Republic of Belarus establishing equality of citizens before the law.

The prohibitions stipulated in article 3 of the Declaration are in the main reflected in Chapter 8 of the Penal Code of the Republic of Belarus, "Offences against the life, health, freedom and dignity of persons". Furthermore, the prohibition of collective punishment (para. 2 (b)) is entailed by the contents of articles 20, 21 and 36 of the Penal Code of the Republic of Belarus, which deal with the individualization of punishment; the crime of pillage (para. 2 (e) of the Declaration) is covered in article 88 of the Penal Code of the Republic of Belarus; the legislation of the Republic of Belarus contains no regulations concerning "deliberate deprivation of access to necessary food, drinking water and medicine" (para. 2 (f) of the Declaration); threats or incitement to commit the offences enumerated in article 3 of the Declaration (para. (g)) are punishable in accordance with article 17, section 5 and article 202 of the Penal Code of the Republic of Belarus.

The content of article 4, paragraph 1 of the Declaration is reflected in the following articles of the legislation of the Republic of Belarus:

Article 23 of the Penal Code of the Republic of Belarus, "Deprivation of liberty";

Article 94 of the Code of Criminal Procedure of the Republic of Belarus, "Notification of detention of an accused person";

Article 14 of the Corrective Labour Code of the Republic of Belarus, "Committal of convicted persons to prison to serve sentence".

Communication with the outside world by convicted persons (art. 4, para. 2 of the Declaration) is dealt with in articles 26, 28 and 30 of the Corrective Labour Code of the Republic of Belarus.

The provisions of article 4, paragraph 3 of the Declaration correspond to those of article 25 of the Constitution of the Republic of Belarus, and also of articles 7, 85, 91, 92 and 98 of the Code of Criminal Procedure of the Republic of Belarus.

Concerning article 5, on restriction of the use of force against citizens, we should mention that the Militia Act of 26 February 1991 of the Republic of Belarus contains a special section 5, "Utilization by the militia of physical force, special means and firearms", which deals with this matter.

The legislation of the Republic of Belarus does not provide for the possibility of compulsory displacement of the population (or an individual), which is dealt with in articles 7 and 11 of the Declaration. Article 30 of the Constitution establishes the right of citizens of the Republic of Belarus to move about freely and choose their place of residence within the boundaries of the Republic. Furthermore, the Act of 1 March 1994 of the Republic of Belarus deleted from article 21 of the Penal Code its paragraphs 2 and 3, which provided for exile and banishment as specific forms of punishment for the commission of an offence.

The right to life (art. 8 of the Declaration) is established in article 24 of the Constitution of the Republic of Belarus. The conditions for application of the death penalty, pending its complete abolition, are specified in article 32 of the Penal Code of the Republic of Belarus, and in this regard our legislation goes beyond the requirements of article 8, paragraph 3, of the Declaration, since it precludes from condemnation to the death penalty all women, and not merely pregnant women and mothers of young children.

The provisions of the first part of article 9 of the Declaration correspond to the content of article 26 of the Constitution of the Republic of Belarus.

The provisions of article 9 (a) of the Declaration are covered in articles 48, 142, 143, 174 and 148 of the Code of Criminal Procedure of the Republic of Belarus.

The requirements of article 9 (b) are satisfied by article 36 of the Penal Code of the Republic of Belarus.

The requirements of article 9 (c) are met by article 3, section 2, of the Penal Code of the Republic of Belarus.

The provisions of article 9 (d) correspond to articles 245 and 246 of the Code of Criminal Procedure of the Republic of Belarus.

Article 9 (e) of the Declaration is covered by article 27 of the Constitution of the Republic of Belarus.

The requirements of article 9 (f) are met by article 5, paragraph 9 of the Code of Criminal Procedure of the Republic of Belarus.

The requirements of article 9 (g) are covered by article 6 of the Penal Code of the Republic of Belarus.

Article 23 of the Rights of the Child Act of 19 November 1993 of the Republic of Belarus parallels the provisions of article 10 of the Declaration prohibiting participation by children in warlike activities.

The provisions of articles 12-15 of the Declaration seem to us to come under the heading of regulation of international law on armed conflicts as part of international humanitarian law. In this instance the Republic of Belarus is guided mainly by the international obligations it has assumed. Apart from that, article 25 of the Penal Code of the Republic of Belarus, on "Looting" and article 257 of that Code, on "Ill-treatment of prisoners of war", establish criminal responsibility for acts such as are dealt with in article 13 of the Declaration.

Thus the minimum humanitarian standards provided for in the text of the Declaration are reflected virtually in full in the legislation of the Republic of Belarus.

Jordan

[Original: Arabic]
[9 December 1995]

After making a review of the minimum humanitarian standards adopted at the international level, the Government of Jordan concluded that all the international and regional instruments focus on international principles, rules and guidelines for the protection of human rights in general and indicate the minimum humanitarian standards of those rights in order to protect them and provide them with adequate safeguards. The States parties to those instruments are urged to observe and ensure respect for those rights and to incorporate those principles and guidelines in their national legislation in a manner consistent with the international endeavours in this field. The Government noted that, unfortunately, most of the instruments do not have legally binding force, nor do they make provision for international sanctions against any State that violates the rules and principles. Their only binding force consists in a feeling of moral obligation on the part of the State concerned.

The Government then provided an overview of minimum humanitarian standards at the national level, stating that Jordan has always been in the forefront of the countries, in particular the developing countries, that show adequate concern for human rights and fundamental freedoms. It has ratified most (10 out of 13) of the international and regional human rights conventions and has amended much of its national legislation in a manner consistent with the directives of the United Nations. In fact, it has put those principles into practical effect by showing due regard for minimum humanitarian standards.

The extent to which minimum humanitarian standards are observed in Jordan is examined below.

I. MINIMUM HUMANITARIAN STANDARDS AT THE NATIONAL LEVEL

A. Minimum humanitarian standards at the investigation stage

One of the most important principles that the Jordanian legislature has emphasized at the investigation stage is the assumption that the accused is innocent until proved guilty at a lawful trial (presumption of innocence). Jordanian law also recognizes other human rights at the preliminary investigation stage. These include:

(a) The right to seek the assistance of a lawyer. This right, which is referred to in article 63, paragraph 1, of the Code of Criminal Procedure, means that the accused does not have to answer the charge unless his lawyer is present;

(b) The right of the accused to be informed of the charge brought against him (art. 63, para. 3);

(c) The provision of adequate safeguards, in keeping with minimum humanitarian standards, during arrests and searches through supervision by the Department of Public Prosecutions, from which permission must be sought before any search is conducted. Moreover, no one can be arrested or imprisoned except in accordance with the provisions of the law and by order of the competent authorities (art. 103 of the Code of Criminal Procedure);

(d) The police and security authorities are empowered to hold suspects for questioning only for 24 hours and any official who violates this provision is liable to the penalty for the offence of unlawful detention (art. 113 of the Code of Criminal Procedure).

These are the principal safeguards that Jordanian legislation currently provides at the stage in which an accused person is questioned. In actual practice, the Department of Public Prosecutions, being one of the pillars of the regular judiciary which believes that defendants should be tried before their natural judge, fully supervises the investigation procedures, even in their initial stages when the investigation is undertaken by the police and security authorities. The latter are responsible for informing the Department of Public Prosecutions immediately of any charge brought against any person, who is then questioned by the public prosecutor in private, only the person's lawyer being permitted to attend.

B. Minimum humanitarian standards at the trial stage

Jordan has a fully independent judiciary, which ensures that judges are impartial in their judgements and in their application of the law (art. 97 of the Constitution). This independence also has a positive impact on the personal freedoms and rights of individuals. Our courts guarantee minimum humanitarian standards for persons on trial. The most important rules and principles that ensure the application of those standards in Jordan can be summarized as follows:

(a) Trials are held in public, as a result of which the performance of the courts can be monitored by anyone (art. 101 of the Constitution);

(b) All citizens are equal, without discrimination among them in regard to their rights and obligations, notwithstanding any differences in race, language or religion (art. 6 of the Constitution);

(c) The courts are protected from interference in their affairs;

(d) The courts diligently safeguard the right of the accused to a defence;

(e) No one is put on trial except in accordance with the provisions of the law;

(f) The legislature has provided special safeguards for certain categories of persons, such as juveniles, in the event of their being put on trial, in order to uphold and protect their rights through courts governed by special legislation and courts specialized in the trial of juveniles. The same applies to women. The measures taken by the legislature in this regard are in keeping with the international tendency to show special regard for the rights of children, juveniles and women when administering justice.

C. Minimum humanitarian standards at the stage of enforcement of penalties

Increasing international and local concern is being shown for human rights at all stages of criminal proceedings and calls have been made for this stage to become an integral part of the criminal proceedings. All the international and regional instruments refer to the need to review prison laws and regulations in order to make their provisions consistent with those of the Constitution, other legislation and the Standard Minimum Rules for the Treatment of Prisoners. In keeping with this trend, the Jordanian legislature has made provision for safeguards for convicted persons during the stage of enforcement of their penalties in accordance with the Prisons Act No. 23 of 1953 and the Prisons Statute No. 1 of 1955. The principal safeguards that ensure the application of minimum humanitarian standards to convicted persons at the stage of enforcement of their penalties are as follows:

(a) The Prime Minister, the Ministers of the Interior and Justice and the head of the Department of Public Prosecutions have the right to visit and search prisons at any time in order to verify their compliance with the regulations governing conditions of detention. They also examine the prison food from the standpoint of quality and quantity and ensure that the general and internal prison regulations are being observed (art. 5 of the Prisons Act);

(b) Government doctors are assigned by the Minister of Health to visit the prison every day in order to provide health care for its inmates. Every prisoner is also examined at the time of his admission to the prison (art. 7 of the Prisons Act);

(c) Special places are allocated to women in the prisons and male prison warders are prohibited from entering such places that are restricted to female detainees (art. 13 of the Prisons Act);

(d) Different categories of prisoners are segregated. For example, special places are allocated to prisoners awaiting trial, convicted prisoners, juveniles and women (art. 20);

(e) Sick prisoners are transferred to hospitals;

(f) In order to encourage prisoners to improve their conduct, develop in them a spirit of industriousness and ensure that their treatment is sufficiently lenient to be conducive to their reform, all the prisons make the arrangements needed to enable every prisoner serving a sentence of one month or more to merit release when no more than one quarter of his full sentence remains to be served;

(g) Prisoners are permitted to visit and communicate with the outside world and ministers of religion are allowed to enter the prison in order to visit prisoners seeking their services.

The Prisons Statute No. 1 of 1955 covers all the requirements needed to ensure observance of the minimum humanitarian standards. The internal regulations of Jordanian prisons have also recently been amended, since the prisons have been converted into reform and vocational rehabilitation centres. The prison administrations now permit prisoners to engage in occupational and craft activities in such a way as to achieve a degree of proficiency in those occupations and crafts that will be of benefit to them in their working lives following their release from prison. That experiment has proved highly successful, since it has helped to rehabilitate large numbers of prisoners.

In short, it can be seen from the above that the Jordanian legislature respects and guarantees all the rights and freedoms of persons in such a way as to promote the application of the minimum humanitarian standards at the stages of investigation, trial and enforcement of penalties, in addition to showing due regard for minimum humanitarian standards in general. This trend is consistent with the measures taken by the international community in this regard.

With respect to paragraph 3 of Commission on Human Rights resolution 1995/29 in which States are invited to consider reviewing their national legislation in such a way as to safeguard human rights in situations of public emergency, it should be noted that a Royal Decree was promulgated on 30 March 1992 endorsing the Council of Ministers' decision to lift martial law. Accordingly, the instructions issued by the martial law administration, as well as any amendments thereto, have automatically become null and void.

II. COMMENTS, VIEWS AND PROPOSALS CONCERNING THE QUESTION OF MINIMUM HUMANITARIAN STANDARDS

Having reviewed the situation at the international level, as well as the corresponding situation at the national and internal level in Jordan, and having ascertained that the trend in Jordanian legislation is more or less consistent with the international trend in this field since Jordanian law guarantees the application of all humanitarian standards at their minimum levels, the Government of Jordan makes the following comments and proposals:

1. Since article 3 of Commission on Human Rights resolution 1995/29 invites all States to consider reviewing their national legislation relevant to situations of public emergency with a view to ensuring the application of human rights and minimum humanitarian standards, on 30 March 1992 the Jordanian Council of Ministers decided to lift martial law and revoke the instructions issued by the martial law administration. That decision was endorsed by a Royal Decree. The cases that were being heard by martial law courts have been transferred to the State security courts the judgements of which, in accordance with their statute, are subject to cassation, whereas the judgements of the martial law courts were final. This development has had a favourable impact on the rights and freedoms of individuals. This development is in full conformity with the text of paragraph 3 of resolution 1995/29.

2. Jordanian law shows due regard for minimum humanitarian standards at the stages of investigation and enforcement of penalties in the manner specified in articles 3, 4 and 5 of the Declaration of Minimum Humanitarian Standards of 1990.

3. The Government notes that the Declaration fails to make provision for legal sanctions against any State that commits acts of torture and cruel, inhuman or degrading treatment against its citizens, particularly at the stage of enforcement of penalties. In fact, the provisions contained in the Declaration are general and abstract and make no mention of any sanctions against the States that commit those acts, even though those acts are widespread in many countries of the world.

4. The Declaration also makes no provision for support and encouragement for States, such as Jordan, which are undertaking rehabilitation programmes for prisoners, bearing in mind the fact that those programmes are a heavy burden on the budget of the State, particularly if it has only modest economic resources. Those States should receive support and encouragement as an incentive to continue those programmes, which ensure more effective implementation of minimum humanitarian standards at the stage of enforcement of penalties.

5. The Declaration makes no reference to cases of administrative detention, solitary confinement, preventive detention and detention for long periods of time without trial and at little-known locations. These phenomena are widespread in many countries of the third world and the failure to refer to such cases will prompt those countries to perpetuate the violation of human rights.

6. The Declaration does not deal adequately with the question of the taking of hostages, to which reference is made in article 3, paragraph 2, even though this phenomenon constitutes a serious violation of human liberty, the majority of its victims being innocent persons.

In conclusion, in spite of these modest comments, the Government of Jordan finds that the Declaration of Minimum Humanitarian Standards, which was adopted in Finland on 2 December 1990, will, on the whole and in the event of its final adoption, constitute a further token of the international community's concern for human rights.

Kuwait

[Original: Arabic]
[15 February 1996]

Introduction

Having studied the Declaration, the Kuwaiti authorities wish to point out, at the outset, that, in accordance with recognized international law and national legislation on human rights, states of martial law to which countries resort in some cases in order to deal with emergency situations constitute an exception to the general rule. Such exceptions should remain conditional and of limited duration and their scope should not be expanded, since any exaggeration in this regard might be viewed as a violation of the basic rights

of individuals. According to the explanatory note annexed to the Kuwaiti Martial Law Act promulgated in 1967, the proclamation of martial law means that the country has moved from the normal situation to which people have grown accustomed to an exceptional situation in order to meet specific needs and requirements.

Kuwait, which is diligently seeking to apply the concepts of the rule of law and legal institutions in its society on the basis of respect for human rights, has resorted to the imposition of martial law only in two rare cases. The first case, in 1967, lasted for seven months and the second, following Kuwait's liberation from the claws of the iniquitous Iraqi occupation, was strictly limited in scope and lasted for a short period of time amounting to only four months; it complied fully with the requirements of the prevailing humanitarian standards, as set forth in the international conventions in force, including the International Covenant on Civil and Political Rights, article 4 of which stipulates that, in times of officially proclaimed emergency, States may take measures derogating from their obligations under the Covenant provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination on the ground of colour, sex, language or religion.

It is noteworthy that the State of Kuwait has respected the provisions of that article even though it is not a party to the said Covenant.

Hence, it can be said that Kuwait dealt with those situations in an exemplary manner, as attested by all the international bodies concerned in this field. It might be useful to highlight Kuwait's experience in this regard.

The position of Kuwaiti legislation on the question of martial law

On this question, it is well known that Kuwaiti legislation, and primarily the Kuwaiti Constitution, express awareness that the country might face abnormal emergency situations that require the adoption of extraordinary and exceptional measures.

In this connection, article 69 of the Constitution stipulates that: "The Amir may proclaim martial law in legally defined cases of necessity by applying the legally prescribed procedures. Martial law can be proclaimed only by a decree which must be submitted to the National Assembly within 15 days from the date of its promulgation so that a decision can be taken concerning its continued application. If the proclamation is made during a period when the National Assembly has been dissolved, the matter must be referred to the new Assembly at its first sitting. Martial law can continue only if a decision to that effect is taken by a majority vote among the members of the Assembly. In all cases, the matter must be resubmitted to the National Assembly, in accordance with the aforesaid procedure, every three months."

In this regard, the explanatory notes annexed to the Constitution indicate that, under the terms of article 69, martial law must be proclaimed by a decree in view of the need for rapid action in defence operations. However, this and other similar provisions in the Constitution do not

prevent the Head of State and the Government from seeking the opinion of the National Assembly in advance if circumstances so permit. This is left to the discretion of the Amir and his Government, without any compulsion. In fact, the popularity of the system of government militates in favour of such a procedure wherever possible.

It seems evident from that article of the Constitution and its explanatory note that they were carefully designed to ensure the application of the legal norms needed to guarantee the implementation of martial law in accordance with the restrictions imposed thereon within the framework of the rule of law.

The aggression to which the Arab world was subjected in 1967 necessitated the promulgation of a Kuwaiti national legislative act concerning martial law (Act No. 22 of 1967) which, however, was applied only for a period of seven months. The Public Mobilization Act No. 65 was subsequently promulgated in 1980.

A brief glance at the first Act shows that it consists of 12 articles, the first of which gives the following definition of the circumstances in which martial law can be proclaimed:

(a) If public order and security in the State, or in any part thereof, are endangered.

(b) If the State is subjected to armed aggression, or fears that such aggression is imminent, or in the event of the occurrence of internal disturbances.

(c) In order to ensure the safety of the Kuwaiti armed forces and guarantee and protect their lines of supply and communication and other aspects of their movements and military operations outside Kuwaiti territory.

Article 2 of that Act stipulates that martial law must be proclaimed by decree and specifies the matters that must be mentioned in the said decree. Article 3 details the measures that can be taken by the authority responsible for the administration of martial law. Article 4 indicates that the orders and prohibitions issued by the authority responsible for the administration of martial law shall be implemented by the police or members of the armed forces. It also stipulates that every government employee or public servant must cooperate with them to that effect. Article 5 refers to the penalties that can be imposed on anyone who fails to comply with the measures imposed under martial law. Article 6 specifies the court or courts competent to impose the penalties prescribed under the terms of the Act. Article 7 sets forth the rules governing the composition of the said court. It stipulates that the court must consist of a judge of a general court, as president, and two army officers holding the rank of captain or above. Articles 9, 10 and 11 deal with the aspects relating to enforcement of the judgements handed down by the court. Article 10 indicates that the authority responsible for the implementation of judgements always has the right to increase or commute penalties and may also halt the enforcement of a penalty. Article 11 stipulates that the judgements handed down by a martial law court must be enforced in the same manner as those handed down by the ordinary criminal

courts unless otherwise ordered by the authority responsible for the enforcement of martial law judgements. (The Government enclosed with its comments a copy of the Martial Law Act and its explanatory notes, as well as the Public Mobilization Act and its explanatory notes.)

Legal and practical measures taken by the State of Kuwait to deal with the circumstances arising from martial law, and the positive features of this period

In order to highlight the legal and substantive aspects of the measures to which Kuwait was forced to resort after its liberation from the claws of the iniquitous Iraqi occupation, this memorandum will begin by showing that Kuwait's experience in dealing with martial law is exemplary and deserves to be noted.

With regard to the scope of this experience, it is well known that, after its liberation from the claws of the iniquitous occupation which lasted for more than seven months, the State of Kuwait was faced with unstable security conditions. As a result of those and other abnormal circumstances, the legitimate Government was forced to remain in exile for a while and, consequently, was not in the country.

Decree No. 14/91 proclaiming martial law was promulgated on 26 February 1991. Article 1 of that decree stipulated that martial law was proclaimed in Kuwait for a period of three months. Article 2 further stipulated that Shaikh Saad al-Abdullah al-Sabah had been designated as the country's martial law administrator and, as such, would be exercising the exceptional powers vested in him.

This was followed by the promulgation of a number of orders and decrees pursuant to that legislative enactment such as:

(a) The order establishing a central security command headed by the martial law administrator;

(b) The order proclaiming a curfew in Kuwait;

(c) The Council of Ministers' decree empowering the martial law administrator to refer some offences punishable under the ordinary law to the martial law courts;

(d) The order specifying the conditions applicable to searches;

(e) The announcement of the lifting of the curfew;

(f) The martial law administrator's order establishing an office to review judgements handed down by the martial law courts, as well as the above-mentioned orders and decrees.

Article 1 of the first order established a central command for security matters, to be headed by the martial law administrator. Article 2 stipulated that the said command would coordinate the activities of the Army, the Police and the National Guard in connection with matters relating to the integrity of

the country and the security of its citizens, in addition to monitoring the implementation of the security decrees promulgated by the martial law administrator.

The second order, proclaiming the curfew, stipulated that all parts of Kuwait would be under curfew from 10 p.m. to 4 a.m. It further stipulated that the provisions of the preceding article would not apply to persons carrying a written permit issued by the Minister of the Interior. The order also indicated that anyone violating the provisions of the two preceding articles would be liable to a penalty of up to three months' imprisonment and/or a fine of up to 100 dinars.

The Council of Ministers' decree empowering the martial law administrator to refer some offences punishable under the ordinary law to the martial law courts amended some of the provisions of the Penal Code (Act No. 16 of 1960) concerning offences involving explosives, arms and ammunition and falsification of travel documents and civilian identity cards.

The subsequent order in which the martial law administrator lifted the curfew on 17 March 1991 was promulgated only 10 days after his order proclaiming a curfew on 5 March 1991.

It might be appropriate to highlight one aspect of this order, namely the fact that its preamble indicated that, although Kuwait was passing through a period of martial law which justified the imposition of any measure restricting the freedom of its citizens and residents in order to restore peace and security throughout the country, the martial law authorities, seeking to provide a certain degree of liberty and relief for citizens after the military security authorities had succeeded in bringing the security situation in Kuwait under control, did not wish to continue making life difficult for citizens by imposing restrictions on freedom of movement.

The fact that the martial law administrator ordered the lifting of the curfew only 10 days after its proclamation on 5 March 1991 is a clear indication of the wisdom and broad-mindedness of the Kuwaiti leadership, which has inherent respect for the freedom and dignity of its citizens and has no desire to impose any measure that might restrict their liberty or harm their interests unless imperative circumstances so require and only for so long as those circumstances continue to apply.

In order to provide further legal and judicial safeguards for persons convicted by the martial law courts of collaborating with the authorities of the Iraqi regime during the occupation, the martial law administrator promulgated Order No. 9 of 1991 establishing an office under his supervision to review judgements handed down by the martial law courts. Article 2 of that order stipulated that the said office would consist of a number of justices from the Court of Appeal, who would be seconded for that purpose by decision of the Minister of Justice. Article 3 indicated that the task of the office would be to examine judgements handed down by the martial law courts in order to ascertain their conformity with the law so that the Minister of Justice could submit them to the martial law administrator, together with a legal opinion as to whether the penalties imposed should be upheld, increased, commuted or suspended. According to paragraph 2 of that article, the office

would also be responsible for the consideration of any appeals that persons convicted by martial law courts might lodge after their sentences had been confirmed, so that their appeals could be submitted to the martial law administrator for any action that he might deem appropriate in this regard.

In the light of the above review, this memorandum will now highlight a number of positive features of the period of martial law which demonstrate the extent of the Kuwaiti authorities' desire to protect the basic rights and freedoms of individuals. These features can be summarized as follows:

1. The first thing that could be said in this regard is that the decree promulgated on 26 February 1991 vested the Prime Minister with responsibility for administering the country's affairs as martial law administrator. This, in itself, guaranteed that the task would be carried out by a civilian official.

2. The period of martial law lasted for only 4 months and the duration of the curfew was only 10 days, in spite of the security situation with which the country was faced.

3. The desire to maintain the basic safeguards and legal procedural rights of individuals is evident from numerous aspects, such as the following:

(a) With regard to safeguards, it is noteworthy that, although article 1 of the martial law administrator's order stipulated that the Army, the Police and the National Guard would be authorized to search persons and premises at any time of the day or night, article 2 of that order placed a significant restriction on the provision contained in article 1 by strictly prohibiting the search of private residential premises without written authorization from a member of the Department of Martial Law Prosecutions. In other words, such searches could be ordered only by members of the judicial authority and this, in itself, constituted one of the basic safeguards for the maintenance and respect of which every endeavour was made;

(b) With regard to safeguards for persons appearing before the martial law courts, the Kuwaiti legislature diligently sought to apply these safeguards without allowing scope for any abuse or arbitrariness in this connection, as can be seen from numerous aspects, such as the following:

(i) With regard to the composition of the martial law courts, they included members of the judicial authority and did not consist solely of military personnel;

(ii) With regard to the rights of persons on trial before these courts, Kuwaiti legislation guaranteed their right to avail themselves of the services of lawyers and, if they lacked the means to do so, the court had a legal obligation to assign lawyers to defend them;

(iii) The other trial procedures were governed by the rules laid down in the legislation concerning ordinary criminal procedure;

(iv) Trials were held in public in the presence of representatives of the local and foreign information media;

(v) With regard to the right of appeal, the trial procedure was not confined to a single judicial level since the promulgation of the martial law administrator's Order No. 9 establishing an office to review judgements handed down by the martial law courts showed due regard for the need to maintain the legal safeguards by, inter alia, restricting the composition of the office to high-ranking members of the judicial authority. In fact, that order stipulated that the office should consist of a number of justices of the Court of Appeal and defined its tasks in the manner already indicated above. With regard to the measures taken in this connection, after martial law was lifted the judgements handed down by the martial law courts were not regarded as final and were referred to the State Security Court instead of the said office. With regard to the decisions taken by the said office, it ordered the mitigation of the sentences passed in 16 cases.

Observations of the State of Kuwait on the Declaration

With regard to the State of Kuwait's observations on the said Declaration, it should be noted that most of the rights and freedoms specified in that Declaration are guaranteed under the terms of the Kuwaiti Constitution and the legislation promulgated pursuant thereto.

Article 3, paragraph 1, of the Declaration corresponds to article 35 of the Constitution, which stipulates that freedom or belief is absolute and the State shall protect freedom of religious observance in accordance with the established customs, provided that it is not prejudicial to public order. The said paragraph also corresponds to article 36 of the Constitution, which stipulates that freedom of opinion and of scientific research is guaranteed and every person shall have the right to express and propagate his opinion verbally, in writing or otherwise, in accordance with the conditions and procedures specified by law.

Article 3, paragraph 2, of the Declaration corresponds to article 31 of the Constitution, which stipulates that no one may be arrested, detained, searched or compelled to reside in a specific place, nor may his freedom of residence or of movement be restricted, except in accordance with the provisions of the law and no one may be subjected to torture or degrading treatment.

The stipulations contained in the paragraphs of article 4 are covered by the Prisons Regulatory Act No. 26 of 1992 and the Code of Criminal Procedure*.

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* Available for consultation in the files of the Secretariat.

With regard to article 5 of the Declaration, the State of Kuwait has acceded to the International Convention against the Taking of Hostages of 1989.

With regard to article 7 of the Declaration, it should be noted that Legislative Decree No. 21 of 1979 concerning civil defence referred to numerous measures that the State can take in the event of emergencies, general disasters, wars, etc.*

With regard to the rights specified in article 8 of the Declaration, Kuwaiti legislation guarantees the right to life, which is protected by law. As for the prohibition of genocide, to which reference is made in paragraph 2 of article 8, it is noteworthy that Kuwait acceded to the Convention on the Prevention and Punishment of the Crime of Genocide under the terms of Act No. 1/1995 promulgated on 3 January 1995. With regard to paragraph 3 of the same article, concerning the death penalty, this matter is dealt with in the Kuwaiti Penal Code (Act No. 16 of 1960), which stipulates that the death penalty may be imposed only for heinous offences.

Article 8 of the Declaration corresponds to articles 59 and 60 of the Penal Code, concerning pregnant women, and the provisions of article 8, paragraph 4, of the Declaration are covered by article 60 of the Penal Code, which stipulates that the death penalty can be enforced only after its ratification by the Amir.

The provisions contained in article 9 are covered by the Kuwaiti Constitution, the Penal Code and the Code of Criminal Procedure.

With regard to the rights specified in article 10 of the Declaration, Kuwaiti legislation prohibits anyone under 18 years of age from enlisting for military service. The Police Force Regulatory Act No. 23 of 1968 stipulates that anyone appointed to serve in the police force must be over 21 years of age (art. 2). Article 2 of Legislative Decree No. 102 of 1980, concerning compulsory and reserve service, further stipulates that every male Kuwaiti over 18 years of age is liable to compulsory service. According to article 32 of the Army Act No. 32 of 1967, anyone wishing to enlist for military service must be over 21 years of age.

From the above, it is evident that the Kuwaiti legislation regulating enlistment for military service prohibits the recruitment of anyone under 18 years of age for purposes of military service or participation in military operations. This prohibition prevents children from participating in acts of violence, since priority in regard to participation in wars is accorded to older persons.

The provisions of article 11 of the Declaration are reflected in the above-mentioned Code of Criminal Procedure.

Articles 12, 13 and 14 of the said Declaration are covered by the Fourth Geneva Convention of 1949, to which the State of Kuwait acceded under the terms of the decree promulgated on 12 August 1967.

In conclusion, these authorities wish to reaffirm their commitment to the humanitarian standards concerning protection of the rights and freedoms of individuals during periods of martial law, as required by the rule of law and legal institutions and also under the terms of the principles of international law concerning human rights.

Poland

[Original: English]
[31 January 1996]

The proposal of the Declaration of Minimum Humanitarian Standards deserves attention and support. The whole idea of promoting a set of minimum humanitarian standards is an attempt at addressing one of the greatest enemies of human rights and other humanitarian standards: their virtually lawful inapplicability in situations where they are mostly and desperately needed, most notably in situations of internal violence, disturbances, tensions and public emergencies. This leaves a substantial part of the world population without basic protection of their fundamental humanitarian principles. The discernible space of inapplicability of minimum humanitarian standards stems from the following normative arrangements and failures of modern international law:

(a) Non-ratification by all States of major legal instruments of international human rights law (the International Covenants on Human Rights of 1966 and numerous detailed treaties) and of international humanitarian law (the Geneva Conventions of 1949 on the protection of victims of war, and the two 1977 Additional Protocols thereto). A particularly serious problem for the applicability of humanitarian law is posed by a substantially lower number of ratifications of the Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts than of Additional Protocol I;

(b) Permissibility of derogations from human rights standards, which is explicitly provided for by the majority of human rights treaties in situations of emergencies. Typical of these legal instruments is a stipulation whereby in time of public emergency "which threatens the life of the nation" (see art. 4 of the International Covenant on Civil and Political Rights) States parties may take measures for derogation from their obligations contained in treaties ratified by them. Thus, States are lawfully in a position to proclaim a state of emergency and thus derogate from many human rights provisions in situations which they may themselves recognize as a threat to the life of the nation. Clauses on public emergency provide for some restrictions (e.g. derogating measures must be adequate to the "exigencies of the situation" and a prohibition of derogation from some of the most fundamental human rights); however, they leave a large margin for States to decide whether to proclaim a public emergency or not. In the period following the Second World War proclamations of states of emergency had become a regular practice, going far beyond the actual needs and exigencies. Moreover, international supervision over national decisions on proclamations of public emergencies is still very weak;

(c) Limitations of the scope of applicability of international humanitarian law solely to international and non-international armed conflicts. Initially, international humanitarian law was made applicable to armed conflicts of an inter-State character. At a later stage, its applicability was extended to armed conflicts of a non-international character (see art. 3 common to all the Geneva Conventions and the Additional Protocol II). This extension, though revolutionary in itself, has not entirely remedied a problem of internationalized non-international armed conflicts which have become a malaise of modern international relations;

(d) Exclusion of applicability of international humanitarian law to situations not being armed conflicts. According to the prescribed scope of application of the Additional Protocol II of 1977, this instrument is not applicable "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts" (art. 1, para. 2). This is a consequence of the recognition that international humanitarian law is applicable in internal disputes and tensions only if the hostilities reach a certain level of intensity and regularity. Thus, if there are no symptoms of an armed conflict, humanitarian law cannot be applied;

(e) Limitation of applicability of humanitarian standards to subjects of international law. In situations of internal armed conflicts, problems with application of humanitarian rules also arise with regard to actors other than a Government. Both sides in such a conflict should observe humanitarian law but entities other than Governments often question that they are bound by its rules. Likewise, in situations of internal disturbances and tensions groups opposed to a Government often neglect their duty to respect basic humanitarian rules in their actions.

All these gaps and ambiguities about applicability and the actual content of applicable humanitarian standards in all those situations, and particularly in situations of internal disturbances and tensions, allow Governments to resort deliberately to arguments on the absence of specific humanitarian rules in such situations. Being aware of those normative gaps and ambiguities, Governments often use them to avoid the application of even the most basic humanitarian standards. Therefore the practice of States claiming that specific humanitarian standards are not applicable to certain situations in their countries where violence is resorted to must be found extremely deplorable. It is a tragic experience in itself that it was the large-scale human rights violations of recent decades which revealed the existence of gaps and ambiguities in the normative framework for the applicability of minimum humanitarian standards. In the context of an insufficient normative framework one should emphasize the concept of the Declaration of Minimum Humanitarian Standards, which may, to a considerable extent, remedy the existing uncertainty.

The concept of minimum human rights and other humanitarian standards is based, first of all, on an assumption that they are to be applicable in all situations, that is in peacetime, war, as well as during internal disturbances and tensions. Thus, the idea of the Declaration is aimed at ensuring the application of minimum guarantees in all situations, irrespective of their legal characterization. Furthermore, the standards of the Declaration cannot

be derogated from under any circumstances and must be respected, whether or not a state of emergency has been declared. Consequently, it does not contain any threshold of applicability.

Such a deliberate arrangement is the most innovative feature of the Declaration. It departs from the earlier practice of drafting international instruments designed for regulation of specific types of conflicts or situations. It was found useless to follow that line of developing standards and to produce yet another instrument for yet another type of situation characterized by the resort to violence. This might have contributed to further confusion about applicability of humanitarian standards to specific situations and would have reopened futile debates about the legal characterization of specific situations.

For all these reasons, the Declaration commendably reflects another approach by setting standards that are to be applicable in all the possible situations, whatever their legal status under domestic and international law. The Declaration thus constitutes the lowest common denominator for the application of humanitarian standards. This arrangement may thus be expected to override controversies about the legal status of different conflicts and situations, and to eliminate conditionality in the application of humanitarian standards.

As far as applicability ratione personae is concerned, minimum humanitarian standards are designed to be respected by, and applied to, all persons, groups and authorities, thus including both Governments and their possible opponents, irrespective of their legal status and without any adverse discrimination.

The concept is thus that all actors involved in situations of conflicts and tensions are bound by minimum humanitarian standards. Such an approach constitutes a strengthening and an extension of the principle of humanitarian law of non-international armed conflicts whereby the insurgents are bound by article 3 of the Geneva Conventions (see the Judgement of the International Court of Justice of 27 June 1986 (merits), case concerning Military and paramilitary activities in and against Nicaragua, footnote 185, whereby the "Contras" are bound by art. 3). In the field of human rights, a reference to the concept of duties of entities other than Governments has been reflected in article 29 of the Universal Declaration of Human Rights ("[E]veryone has duties to the community [...]").

In order to avoid unnecessary political controversies about the status of entities to which minimum humanitarian standards are addressed, the Declaration commendably emphasizes that the observance of these standards shall not affect the legal status of any authorities, groups or persons involved in situations of internal violence, disturbances, tensions or public emergency.

As a consequence of its envisaged application to all possible situations without any threshold of applicability, the Declaration has logically concentrated on actually minimum humanitarian standards, that is standards combining the most fundamental rules of humanitarian law and human rights law. Therefore, the standards reflected in the draft Declaration predominantly

include rules already contained in the existing instruments, as well as those reflected in established customary international law. Consequently, the Declaration consists largely of rules being the reaffirmation of modern international law but also contains aspects of its progressive development.

A list of core humanitarian standards, as based upon existing and universally accepted rules, may, however, be open to further negotiation as to its scope. Nevertheless, a focus on the irreducible core of humanitarian standards strengthens prospects for the Declaration to be accepted and adopted.

The idea of the Declaration is designed for unequivocal clarification of the scope of applicability of minimum humanitarian standards and to serve instructive and dissemination purposes. As a set of standards politically and legally neutral, and motivated by purely humanitarian considerations, the Declaration may be expected not to politicize the whole debate.

While promoting the idea of the Declaration, the Government of Poland is fully aware that Commission resolution 1995/29 has merely initiated a long process of consultations and possible decision-making. Further promotion of the idea of a set of minimum standards should enhance a need for the adoption of the Declaration. Since both the content of the Declaration and reasons substantiating the desirability of its adoption belong to fairly complicated issues, particularly for non-lawyers, it appears advisable, at a next stage of promotion, to have the Commission on Human Rights convene a seminar of governmental experts to discuss the whole concept and to report to the next session of the Commission.

The Government of the Republic of Poland attaches great importance to the idea of further promotion of the Declaration of Minimum Humanitarian Standards within the Commission on Human Rights and, subsequently, the General Assembly. Poland strongly believes that the United Nations, guided by the spirit of the universal protection of all human beings, should give priority to the adoption of a Universal Declaration of Minimum Humanitarian Standards.

Office of the United Nations High Commissioner for Refugees

[Original: English]
[25 January 1996]

UNHCR is very much interested in the process of developing a Declaration of Minimum Humanitarian Standards. Overall, it is considered that the scope, content and application of a declaration of this character could provide a useful framework to enhance the legal protection of individuals. As expressed in the comments submitted by the International Institute of Humanitarian Law*, it is noteworthy that the principles underlying the Declaration have a character of jus cogens. Furthermore, the application of the Declaration to all possible situations including international and non-international armed

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* See E/CN.4/1996/80, pp. 8-11.

conflicts, disturbances, ethnic conflict, and other emergency or non-emergency situations is considered a useful approach. In addition, the fact that the standards contained in the Declaration are in the form of non-derogable rights respected by and applicable to all persons, groups and authorities, irrespective of their legal status, may be helpful in terms of enhancing compliance with international standards. This also implies the important dimension of international individual criminal responsibility.

Notwithstanding the many positive aspects of formulating a Declaration of Minimum Humanitarian Standards, in our view, the rights contained in the Declaration must be phrased in such a way as not to contradict existing international instruments. As such there is a concern, as has been expressed by some commentators, that the Declaration may tend towards a lowest common denominator of legal standards and thereby set a weaker protection framework. Accordingly, the question of promoting minimum standards needs to be carefully debated and UNHCR would be interested in participating in any further discussions on this matter.

UNCHR's mandate is to provide international protection to refugees and to seek durable solutions to their problems. In this regard it is noted that the Declaration does not address the issue of the "right to seek and enjoy asylum". Although article 7 addresses the issue of displacement and thereby the "right to remain" and the "right to return", the right to seek and enjoy asylum outside one's country, as stipulated in article 14 of the Universal Declaration of Human Rights, is not reflected in the Declaration and should not, in any way, be undermined by the implementation of these minimum standards. We feel this should be properly reflected in any future formulation of the Declaration.

International Commission of Jurists

[Original: French]
[4 March 1996]

1. We welcome the proposal to adopt a text that would fill the legal gap left by existing texts on humanitarian law concerning situations of internal conflict not addressed by the common article 3 of the four Geneva Conventions and by their Additional Protocol II. The Declaration covers situations of violence, internal disorder, internal tension and public emergency not provided for in international human rights law and international humanitarian law applicable in armed conflicts.

2. We wish to express several reservations regarding the adoption of this document.

3. The International Commission of Jurists (ICJ) remains very cautious in its assessment of this text, which sets minimum humanitarian standards that, by the very use of the term "minimum", imply a limitation on the scope of humanitarian law. The ICJ has always been reluctant to follow those who wish at all costs to adopt texts for the establishment of minimum standards. Such instruments are double-edged, for the desire to establish a minimum, limited framework for the protection of certain rights often makes it easy to forget the more general context of the protection of other equally important rights.

4. The adoption of minimum standards which are applicable in all situations, as stated in article 1, entails the risk of limiting the range and scope of the existing rules of humanitarian law, particularly the provisions of the Geneva Conventions, to this set minimum. While article 20 of the Declaration clearly states that none of its provisions shall be interpreted as restricting or weakening the provisions of any instruments of humanitarian or human rights law, caution must nevertheless be exercised. The proliferation of instruments in the field of humanitarian law must not lessen the impact and scope of the basic principles of humanitarian law which are established and applicable in all circumstances. On no account must the adoption of this Declaration of minimum humanitarian standards limit the broader scope of the general rules of humanitarian and human rights law.

5. The provisions of humanitarian law must not be reduced to a few rules which are considered essential at the expense of other, equally important, rules concerning international and internal conflicts. That would entail the risk of reducing the applicable humanitarian laws to those minimum principles, to the detriment of the numerous and more specific rules of humanitarian and human rights law.

6. The Declaration must not be viewed as an alternative to the application of the more general provisions of humanitarian law, but rather as a complement reinforcing the existing provisions.

Inter-Parliamentary Union

[Original: English]
[25 January 1996]

The Inter-Parliamentary Union submitted a copy of the resolution of the IPU Council and the report of the IPU Committee to Promote Respect for International Humanitarian Law, dated October 1995; also enclosed was a paper on The Functions of Parliament during a State of Emergency that was prepared by Mr. Leandro Despouy (Argentina) for the Inter-Parliamentary Symposium on "Parliament: Guardian of Human Rights", held in Budapest in May 1993, and the Summing-up of the Deliberations by the President of the Symposium, which also contains a full section on Parliament in states of emergency*.

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* Available for consultation in the files of the Secretariat.